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In The

Supreme Court of the United States

WARREN TODD HOEFFNER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the Government during a criminal trial abandons an indicted claim or theory of prosecution, does the Double Jeopardy Clause of the Fifth Amendment bar the reprosecution of the abandoned claims and theories at a second trial.

2. If an abandonment is an event that terminates jeopardy, must a court perform the same thorough analysis of what is barred by both the claim and issue-preclusive effects of the abandonment as is required in the event of other jeopardy-terminating events such as an acquittal.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were Petitioner Warren Todd Hoeffner and Respondent the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Warren Todd Hoeffner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the denial of his motion to bar his retrial on double jeopardy grounds.

OPINIONS BELOW

The United States District Court for the Southern District of Texas entered an order denying Hoeffner's motion to bar retrial on double jeopardy grounds. App. 28. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court on interlocutory appeal is reported at 626 F.3d 857. App. 1.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 2010. A petition for rehearing was denied on January 4, 2011. App. 30. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment, reproduced in the appendix to the petition, provides in relevant part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]" App. 32. The mail fraud statute, 18 U.S.C. § 1341, wire fraud statute, 18 U.S.C. § 1343, and honest services fraud statute, 18 U.S.C. § 1346, are also reproduced in the appendix. App. 32-34.

STATEMENT OF THE CASE

Petitioner Warren Todd Hoeffner is an attorney who represented hundreds of clients with injury claims against the sellers of products that cause silicosis. He was charged with, *inter alia*, mail, wire and honest services fraud, 18 U.S.C. §§ 1341, 1343, 1346, based on payments he made to two employees of The Hartford Financial Services Group ("The Hartford"), one of the insurers of the silicosis defendants he had sued on behalf of his clients. The indictment charged Hoeffner with paying "bribes and kickbacks" to Rachel Rossow and John Prestage (the "Employees") in exchange for the Employees to "falsely" represent within The Hartford that proposed settlement amounts with Hoeffner's clients were appropriate. Following six weeks of trial and three days of deliberation the jury was unable to render a verdict

on any count, and the district court declared a mistrial. Hoeffner moved to bar retrial on double jeopardy grounds based on the Government's abandonment at trial of the sole theory of fraud alleged in the indictment. The district court denied the motion, Hoeffner filed an interlocutory appeal, and the Fifth Circuit affirmed.

Hoeffner argued on appeal that the Government's abandonments terminated jeopardy on the indictment's sole fraud theory. The Fifth Circuit found that the Government had affirmatively abandoned both the indictment's honest services fraud theory of prosecution and any claim that the payments were "bribes and kickbacks," and held that the Double Jeopardy Clause precluded retrial on those abandoned theories and allegations. But the court also held that the indictment alleged a separate and distinct money or property fraud theory based on the mere failure to disclose those same payments that was not abandoned.

Despite *holding* that double jeopardy applied, the Fifth Circuit purported to "assume, without deciding, that the abandonment functioned as an acquittal of the defendant with regard to the honest services fraud theory[.]" App. 20. By prefacing its double jeopardy analysis on the "assumption" that the abandonments functioned as an acquittal, the court below eroded its holding under the Double Jeopardy Clause that abandonment, like an acquittal, is a jeopardy-terminating event. By failing to directly and fully resolve if an abandonment is an event, such as an

acquittal, that terminates jeopardy, the Fifth Circuit also obscured whether its analysis was constitutionally mandated or the prudential result of the Government's abandonments at trial. This left unanswered an important, and consequential to the Petitioner, question – whether abandonment of an indicted claim or theory at trial is a jeopardy-terminating event, *and*, if so, how to conduct the requisite double jeopardy analysis.

The court below erred when it failed to conduct the full analysis of the double jeopardy implications of the termination of jeopardy it had assumed existed. In analyzing the preclusive effects of the theories and allegations it found were affirmatively abandoned, the court focused only on the disparate *elements* of the indicted honest services and money or property fraud schemes. This elements analysis, although relevant to the *claim preclusion* effect of the Double Jeopardy Clause, failed to adequately consider the separate *issue-preclusive* effects of the abandonments. The court thus failed to perform the necessary analysis of the scope and effect of the Government's abandonment of the underlying *fact* that the undisclosed payments constituted bribes or kickbacks.[1]

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[1] That the court below failed to differentiate between claim and issue preclusion is apparent on the face of its opinion, and also from Judge Garza's statement during the oral hearing in this case that "[y]ou can't have double jeopardy unless you have substantially the *same elements* [ ] that were abandoned." Oral arg. at 25:58, Aug. 3, 2010, http://www.ca5.uscourts.gov/OralArg

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Based on that incomplete analysis, the Fifth Circuit held only that retrial under the expressly abandoned honest services fraud theory was barred, but that a money or property fraud-by-nondisclosure of the mere fact of the payments theory survived and could be the subject of a second trial. If the court had properly considered the separate issue-preclusive impact of the Double Jeopardy Clause, it would have found that a second trial will require the reprosecution of a fact that was already decided in Hoeffner's favor by the Government's abandonments during the first trial. Hoeffner is thus left at his peril to face in his pending second trial the identical factual allegations that should be barred by the issue-preclusive effects of the Government's strategic and intentional abandonments.[2]

Recordings/09/09-20781_8-3-2010.wma (emphasis added); *see also id.* at 8:30 (Judge Garza: "The elements for honest service is different and distinct than the elements that have to be proved for concealment. . . . Can you have double jeopardy if the elements are different."); *id.* at 25:18 (Judge Garza: "Am I not correct that the elements of proving honest services and the elements of proving fraud by concealment are separate.").

[2] Hoeffner was tried under the First Superseding Indictment, which is the indictment at issue in Hoeffner's appeal and this petition. Record at 229 ("R-"). After Hoeffner filed his double jeopardy motion, the Government filed a Second Superseding Indictment. R-5035. That indictment was immaterial to the Fifth Circuit's analysis because it was not the subject of Hoeffner's motion. The First Superseding Indictment has never been dismissed by the Government, and Hoeffner thus remains at risk to face retrial under that same indictment.

If the Government's abandonments during Hoeffner's first trial were events that terminated jeopardy, then the court below was required to determine the full extent of both their claim *and issue-preclusive* effects. Instead, the court erred by limiting its analysis to the disparate elements of the two indicted theories of fraud.

A. Proceedings at Trial.

1. The indictment and early presentation of the Government's case advanced a single theory of the scheme to defraud.

Each count of the indictment included allegations that Hoeffner paid "bribes and kickbacks" in exchange for "misrepresentations" by the Employees, which served as the foundation of both the "honest services" fraud and "money or property" fraud theories charged in the indictment. *Cf.* Oral arg. at 28:53 (Government conceding that "the phrases bribery and kickback obviously are terms of art in the federal criminal arena. *But they do accurately and correctly describe* the undisclosed, under the table, unreported payments") (emphasis added). The payments made by Hoeffner to the Employees were repeatedly *and exclusively* characterized in the indictment as "bribes and kickbacks." R-236, 252.[3]

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[3] Post-indictment, the Government issued a "news release" which characterized the indictment as alleging a theory of fraud that Hoeffner paid "bribes and kickbacks" in exchange for falsely

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The Government, throughout the early presentation of its case, consistently and unambiguously described the alleged fraud as a "bribery and kickback scheme." R-451; *see also, e.g.*, R-163-64 ("[T]he evidence in this case is going to show bribes, kickbacks paid to [the Employees]. . . ."); R-2177 ("We're charging a fraud involving [ ] payments of bribes and kickbacks to [the Employees] by [Hoeffner]. . . .").

Before trial, the Government participated in drafting a "summary of the case," which the court read to potential jurors during voir dire:

> The indictment . . . alleges . . . that Mr. Hoeffner paid *bribes and kickbacks* to [the Employees] *for recommending* that The Hartford and its subsidiaries pay certain amounts of money to settle claims for Mr. Hoeffner's clients. . . . The indictment alleges that [Hoeffner and the Employees] *falsely represented* to The Hartford that the settlement amounts were appropriate and in the best interest of The Hartford. . . .

R-8665-67 (emphasis added). Neither in the summary of the case, nor elsewhere, did the district court describe to the jurors any other fraud theory.

Immediately before opening statements, the Government conveyed to the jury a "summary of what

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recommending that the settlements were "appropriate and cost effective." R-4943-44. Like the indictment, the release articulated no other fraud theory of prosecution.

the indictment reads[.]" R-2947. The summary again described *only a single prosecutorial theory*, that Hoeffner had committed fraud by paying *bribes and kickbacks* to the Employees *in exchange for their false representations* to The Hartford regarding the appropriateness of the settlements:

> [I]t is alleged the defendant paid *bribes and kickbacks* to [the Employees], *for recommending* that The Hartford and its subsidiaries pay certain sums of money to settle the claims of the defendants' clients against The Hartford, its subsidiaries and its insurers. The *bribes and kickbacks* were allegedly paid *so that [the Employees] would falsely recommend* to The Hartford that the settlement amounts of the claims . . . were appropriate amounts to settle the claims in the best interest of The Hartford. . . .

R-2947-48 (emphasis added).

2. The Government's difficulties in presenting its case.

The difficultly in establishing that Hoeffner had paid bribes and kickbacks to induce false representations regarding the appropriateness of the settlement amounts became apparent to the Government when Hoeffner raised as a defense at trial that "the settlement amounts were fair" and that the payments were not "bribes or kickbacks," but that he "had been extorted into making the payments when [the Employees] threatened to stall the settlement

approvals indefinitely." App. 7. Those difficulties were compounded when the Government's witnesses testified that the settlement amounts were less than or equal to Hoeffner's demands, historical settlement values, and amounts independently determined to be "appropriate" by the insureds, numerous coinsurers, and their counsel. Nor was any evidence presented that The Hartford could or should have settled those claims for less than it did. And evidence showed that, even after learning of the payments, The Hartford paid the challenged settlement amounts, did not seek to unwind or otherwise challenge the settlements, and submitted reinsurance claims for reimbursement of the settlement amounts.

3. The Government's abandonment of its theory of prosecution.

The Government, faced with this challenge to the indictment's "bribes and kickbacks" theory, "[d]uring the course of [the] six-week trial, [] abandoned [the] honest services fraud allegation in the indictment, instead focusing on a money and property fraud allegation[,]" App. 2, and also "retreated from its theory that Hoeffner committed honest services fraud by paying bribes and kickbacks to [the Employees,] [i]nstead [taking] the position that the mere fact of the concealed payments to employees of The Hartford constituted a scheme to obtain money and property from The Hartford." App. 7.

The Government's total abandonment of the indictment's theory of fraud was first evidenced by its repeated disavowals – to the court and jury after trial had begun – of any allegation that the payments had been bribes or kickbacks:

> Defense counsel: But the suggestion has been that Ms. Rossow somehow was receiving bribes and kickbacks for Mr. Hoeffner to get settlements that were higher than what was appropriate.
>
> Prosecutor: That's not what the indictment says.
>
> Court: Excuse me?
>
> Prosecutor: He's misstating what the charges are in this case.

R-3403; *see also, e.g.*, R-3761 (Defense counsel: "The allegation [is that] through bribes and kickbacks John Prestage [] recommended an inflated settlement amount or an inappropriate settlement amount . . . in exchange for that payment." . . . Prosecutor: "No, your Honor. [The indictment] doesn't say that."); R-6260-61 (Defense counsel: "The indictment alleges a bribery scheme, does it not[ ]?" Prosecutor: "Once again, your Honor, it misstates the indictment. . . . [The indictment] does not allege [a] bribery, kickback scheme."); R-7276-77 (Government arguing that its case was not a "bribery scheme").

During the jury charge conference the Government furthered its abandonment by "[completely] withdraw[ing] the honest services fraud theory from

the jury's consideration[,]" App. 8, even submitting a redacted indictment deleting all references to both honest services fraud and bribes and kickbacks. R-8335; *see also* R-8362 ("[W]e are submitting [to the jury] on the part of obtaining by false pretenses and representations, not the part dealing with bribes and kickbacks of performing or depriving of honest rights and services."); R-8373 (Government objecting to a bribes and kickbacks jury instruction and arguing that "[w]e don't think the indictment charges a bribe or a kickback case . . . "); R-8567 (Government objecting to the jury's request during deliberations for a definition of the terms "bribery" and "kickback" because "it is not a bribery case . . . "). At the Government's request "the district court, over [Hoeffner's] objection, removed all references to honest services fraud, as well as bribes and kickbacks, from the jury instructions. . . ." App. 8.

During closing arguments the Government "also renounced the honest services fraud allegation[,]" App. 7, informing the jury that "the charges . . . have been streamlined" and "focused down to [what] the government thinks the evidence supports in this case" to remove any allegations that the payments were made as bribes or kickbacks. R-8464-65, 8542-43.

4. The Government's substitution of a new theory of fraud.

In place of its abandoned honest services fraud theory and allegations that the payments were bribes and kickbacks, the Government presented, over Hoeffner's repeated objections, an alternative fraud theory that "the *mere fact of the concealed payments* to employees of The Hartford constituted a scheme to obtain money and property. . . ." App. 7 (emphasis added). Under that new theory, the mere failure to disclose "payments" – *not* "bribes or kickbacks" or "in exchange for false representations" – constituted the scheme to defraud. *See, e.g.*, R-3761; R-8543. This new theory of fraud abandoned any reliance on bribes, kickbacks, or false representations that the proposed settlement amounts were reasonable, and had not previously been advanced by the Government to the district court or the jury.

The jury was unable to render a verdict on any count and the district court declared a mistrial. The district court denied Hoeffner's motion to bar retrial on double jeopardy grounds.

B. Proceedings in the Court of Appeals.

Hoeffner filed an interlocutory appeal, and a panel of the United States Court of Appeals for the Fifth Circuit affirmed.

The court below found that the Government had "abandon[ed] [] the honest services fraud theory"

after trial had commenced, App. 21, and that its actions during trial had also "decided [] that the payments . . . cannot be characterized as bribes or kickbacks." App. 22. The court also found that "once the government abandons a theory by failing to present any evidence related to the theory, the government cannot seek to retry a defendant on the abandoned theory." App. 26. Applying those findings, the court held that "the Double Jeopardy Clause bars retrial on the honest services fraud theory in the indictment[,]" App. 27, but that Hoeffner could nonetheless face retrial, because the mere "fact of the payments" was not abandoned, App. 22, and the indictment, in addition to the abandoned honest services fraud, alleged a separate money or property fraud theory based on the mere failure to disclose receipt of the same payments that constituted the abandoned bribes and kickbacks alleged in the indictment. App. 17-18.

The Fifth Circuit's conclusion that the abandonments effected only a partial double jeopardy bar was the result of its failure to conduct the requisite analysis set forth by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), and *Yeager v. United States*, 129 S. Ct. 2360 (2009), to determine the preclusive effect of those abandonments. The court below professed to perform that analysis, App. 19-22, but instead of considering both the *claim-preclusive* and *issue-preclusive* effects of the abandonments, the court simply compared the elements of the abandoned claims and the claims to be retried during a second

trial, App. 21-22, but failed to determine if any *factual* issues necessary to prosecute the failure-to-disclose money or property fraud theory had been abandoned. The Fifth Circuit thus confused elements analysis, which is critical to *claim* preclusion, with the fact analysis necessary to determine the scope of any *issue* preclusion.

On January 4, 2011, Hoeffner's petition for rehearing was denied by the court below. The Fifth Circuit's decision thus exposes Hoeffner to a second trial based on the same theories of prosecution and facts that were abandoned by the Government during its first dry run.

REASONS FOR GRANTING THE PETITION

This case presents at least two questions of exceptional importance: whether abandonment of an indicted claim or theory at trial is a jeopardy-terminating event, *and*, if so, how a court should determine what is precluded by the abandonment. Review by this Court is necessary to eliminate the ambiguity inherent in the Fifth Circuit's purported "assumption" as to when and if abandonment is a jeopardy-terminating event equivalent to an acquittal, and thus having both claim and issue-preclusive effects. Review is also necessary to settle the precise analysis required to determine the issue-preclusive scope and effect of an abandonment. This Court's review is thus necessary to fully preserve the crucial

constitutional guarantees and protections embodied in the Double Jeopardy Clause of the Fifth Amendment.

The Double Jeopardy Clause of the Fifth Amendment provides, in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. The Double Jeopardy Clause encompasses both claim and issue preclusion, the latter being commonly referred to as collateral estoppel. As this Court has held, "[t]he preclusive effects of former adjudication are . . . referred to collectively by most commentators as the doctrine of 'res judicata.' Res judicata is often analyzed further to consist of two preclusion concepts: 'issue preclusion' and 'claim preclusion.'" *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) (internal citations omitted). Claim preclusion "forecloses successive litigation of *the very same claim*," whereas issue preclusion "bars successive litigation of *an issue of fact or law* actually litigated and resolved in a valid court determination essential to the prior judgment, *even if the issue recurs in the context of a different claim*." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quotations omitted) (emphasis added). The doctrine of issue preclusion thus ensures that "'when an issue of ultimate fact has once been determined by a valid and final judgment' of acquittal, it 'cannot again be litigated' in a second trial for a separate offense." *Yeager*, 129 S. Ct. at 2367 (quoting *Ashe*, 397 U.S. at 443).

The Double Jeopardy Clause also applies to events that are not technically acquittals, but rather are their functional equivalent for jeopardy-terminating purposes. *See, e.g.*, *Richardson v. United States*, 468 U.S. 317, 325 (1984) ("[Double jeopardy] applies only if there has been some event, such as an acquittal, which terminates the original jeopardy."); *Burks v. United States*, 437 U.S. 1, 10-11 (1978) (dismissal for insufficient evidence constitutes a judgment of acquittal that bars reprosecution under the Double Jeopardy Clause); *Illinois v. Somerville*, 410 U.S. 458, 461 (1973) (double jeopardy bars reprosecution following declaration of a mistrial over a defendant's objection unless there was "manifest necessity" for the mistrial). Such non-acquittal jeopardy-terminating events include those based on prosecutorial conduct during trial. *See Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982) (double jeopardy bars reprosecution where the prosecution intentionally provokes the defendant's successful motion for mistrial); *cf.* App. 19-20 (citing *Humphries v. Wainwright*, 584 F.2d 702, 705-06 (5th Cir. 1978)) ("We have held that when a prosecutor opts to voluntarily discontinue a trial after jeopardy has attached, the dismissal functions as an acquittal on the charge, and issues implicated by the dismissed counts are deemed to be resolved in the defendant's favor.").

The issue preclusion prong of the Double Jeopardy Clause "stands for an extremely important principle in our adversary system of justice." *Ashe*, 397 U.S. at 443. That principle prevents the

Government from forcing a defendant to face ultimate facts already decided in his favor, or from subjecting a defendant to multiple trials as it refines its theories in successive attempts to convict. *See id.* at 445-46 (the doctrine of issue preclusion "is embodied in the Fifth Amendment guarantee against double jeopardy" because "whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time").

The application of issue preclusion to bar abandoned factual theories would ensure the fundamental protections of the Double Jeopardy Clause by precluding the Government from forcing Hoeffner to defend himself in a second trial against the allegation, already abandoned by the Government in his first trial, that Hoeffner's undisclosed payments to the Employees constituted a scheme to defraud The Hartford. Just as issue preclusion requires a determination of what was necessarily decided by an acquittal, *id.* at 444, determining the issue-preclusive effect of an abandonment requires identifying the full scope of the abandonment, including any underlying facts necessarily subsumed therein. To hold otherwise would unfairly permit the Government to hone its case after using the first trial as a dry run for the second prosecution, which is "precisely what the constitutional guarantee forbids." *Id.* at 447.

The court below merely compared the elements of the abandoned honest services fraud theory with the failure-to-disclose elements to determine if any *issues*

had been decided in Hoeffner's favor by the Government's abandonments. This limited analysis permits the Government to retry Hoeffner simply because the elements of honest services fraud are distinct from the elements of fraud by concealment, with no consideration of the issue-preclusive effect of the Government's abandonment of the underlying *fact* that the undisclosed payments constituted bribes or kickbacks made in return for misrepresentations that the settlements were in the best interest of The Hartford.

The Fifth Circuit's opinion threatens to significantly erode the protections afforded by the Double Jeopardy Clause by encouraging prosecutors to indict on multiple theories and then hold some back from the jury's consideration through selective abandonments after jeopardy has attached, in hopes of refining its case and resurrecting those theories and underlying factual issues during subsequent proceedings.

The dangers presented by a lack of clarity regarding the questions presented by Hoeffner's petition are especially troubling here insofar as courts are likely to see many more claims of abandonment as the Government attempts to convert honest services fraud allegations into money or property fraud allegations following this Court's decision in *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010), that "§ 1346 covers only bribery and kickback schemes[,]" which is a reversal of prior prosecutorial practices of

including nondisclosure theories in honest services fraud allegations.

A. Applying Double Jeopardy to Prosecutorial Abandonments Furthers Important Constitutional Protections.

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). The Double Jeopardy Clause was in part a response to the potential for abuse inherent in allowing prosecutors a second chance to convict a defendant. Seventeenth century English judges engaged in the "'tyrannical practice' of discharging juries and permitting reindictment when acquittal appeared likely," thereby giving the Crown prosecutors an opportunity to strengthen their case and try the defendant again. *Crist v. Bretz*, 437 U.S. 28, 42 (1978) (Powell, J., dissenting) (citing *The Queen v. Charlesworth*, 121 Eng. Rep. 786, 801-02 (Q.B. 1861)). In response to this oppressive practice, English courts began to prohibit the dismissal of a jury once it was sworn. *Id.* at 42-43 (citing *The King v. Perkins*, Holt. 403, 90 Eng. Rep. 1122 (K.B.1698)).

American courts later "began to blend the rule against needless discharges of juries into the guarantee against double jeopardy contained in the Federal and State Constitutions." *Id.* at 45 (citing cases).

"[T]he prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice [of discharging a jury whenever it appeared that the Crown's evidence would be insufficient to convict]." *Arizona v. Washington*, 434 U.S. 497, 507-08 (1978) (citing *State v. Garrigues*, 2 N.C. 241 (N.C. Super. Ct. L. & Eq. 1795)).

As this Court noted in *United States v. Dinitz*, 424 U.S. 600, 611 (1976), the Double Jeopardy Clause operates to protect defendants from oppressive governmental practices similar to those engaged in by Crown prosecutors and judges. *See also Arizona*, 434 U.S. at 508 ("[T]he strictest scrutiny is appropriate . . . when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused."); *Downum v. United States*, 372 U.S. 734, 736 (1963) ("Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches.") (citation omitted).

This Court recently reaffirmed the important purposes of the Double Jeopardy Clause:

> [One] vitally important interest[ ] [protected by the Double Jeopardy Clause] is the "deeply ingrained" principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby

> subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Yeager, 129 S. Ct. at 2365-66 (quoting *Green*, 355 U.S. at 187-88).

A prosecutor who is given a second chance can present a more effective case by learning from the mistakes of the first trial, reassembling his evidence, and remedying any deficiencies, thus affording himself a more favorable opportunity to convict even an innocent defendant. *See Tibbs v. Florida,* 457 U.S. 31, 41 (1982) ("[The Double Jeopardy Clause] prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction.").

In addition to safeguarding against multiple trials being used as dry runs to refine the prosecutor's case, the need to limit governmental action is also reflected by "society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant . . . manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." *United States v. Jorn*, 400 U.S. 470, 479 (1971); *cf. Wade v. Hunter*, 336 U.S. 684, 689 (1949) (the Double Jeopardy Clause affords a criminal defendant a "valued right to have his trial completed by a particular tribunal. . . .").

Permitting the Government to pick and choose indicted theories to present to the jury after trial has commenced -- by selectively abandoning factual theories and allegations while advancing others for the purpose of avoiding an unfavorable verdict – only to resurrect those theories at a second trial under more favorable circumstances, is precisely the type of prosecutorial abuse the Double Jeopardy Clause was intended to prohibit:

> The reasons why this "valued right" [for a particular tribunal] merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona, 434 U.S. at 503-05.

If abandonment is held not to terminate jeopardy on abandoned theories and allegations, including *any underlying issues or facts* that were subsumed therein, in the same manner as other acquittal-equivalent jeopardy-terminating events, the Government will be free to manipulate prosecutions by selectively

abandoning theories and allegations in one trial, only to resurrect those theories and allegations, or aspects thereof, during one or more subsequent trials.

The Government here had its one opportunity to convict Hoeffner. Hoeffner defended himself at a six week trial against numerous counts of conspiracy and fraud. In the indictment, before trial, and at the beginning of trial, the Government presented a single formulation of the alleged payments in furtherance of a scheme to defraud: that Hoeffner had paid *bribes and kickbacks* to the Employees *in exchange for false representations* regarding the appropriateness of the settlement amounts. As part of that theory, both the indictment and the Government's early written submissions and statements to the district court and the jury repeatedly and exclusively described the alleged payments as bribes and kickbacks in exchange for the alleged misrepresentations. When the Government was faced with Hoeffner's unanticipated trial defense that the settlements were appropriate and that Hoeffner had been extorted by The Hartford's employees, and its own inability to present evidence supporting its allegations, the Government quickly abandoned its honest services fraud theory and also what had been its sole formulation of the alleged payments, and began advancing the theory that fraud resulted from the mere fact that those same payments were not disclosed to The Hartford.

But any payment in the form of a bribe or kickback to an employee to misrepresent the benefit of a payment by his employer to a third party is the same

as a nondisclosure of the payment to the employee for issue-preclusive purposes. If Hoeffner had been acquitted of paying bribes and kickbacks in return for the Employees misrepresenting that the settlements were appropriate, surely a retrial on the theory that the very same payments were undisclosed would be barred by issue preclusion. If an abandonment is the equivalent of an acquittal for double jeopardy purposes, the same result must follow here.

The Government did not simply fail, despite its best efforts, to present sufficient evidence for the jury to reach a verdict. The Government strategically chose to abandon its theories and allegations at trial, not only through presenting no evidence on those theories, but by affirmatively representing to the court and jury, over the strenuous objections of the defense, that bribes and kickbacks had never been part of its case. The only possible impetus behind the Government's blatant and drastic change of course after trial began was its concern with Hoeffner's extortion defense and its own inability to present evidence supporting its original indicted theory.

That the jury was unable to reach a verdict following the Government's midstream alteration of its prosecutorial theories does not in itself bar further prosecution. But neither should it nullify the issue-preclusive effect of the Government's abandonments. The abandonment of *both* honest services fraud and any allegations that the payments were bribes or kickbacks left no room for the Government to claim

that the "undisclosed" payments were money or property fraud, while the payments when labeled as "bribes or kickbacks" were honest services fraud. The charges to be presented during a second trial still rely on those *same payments*, and thus are predicated on the same factual issues already decided in Hoeffner's favor by the abandonment: that Hoeffner's payments to the Employees – *as characterized in the indictment* – did not effect a scheme to defraud The Hartford.

If the Government is permitted to retry Hoeffner on the allegations and underlying facts it abandoned during the first trial, it will have "the opportunity to marshal its evidence and resources more than once" and will have had the chance "to hone its presentation of its case through a trial." *Ohio v. Johnson*, 467 U.S. 493, 501 (1984). At the same time, Hoeffner would be forced to "run the gauntlet" a second time against a case the Government has already tested and refined through the course of the first trial, without holding the Government to the factual determinations it necessarily made when it strategically abandoned its allegations pertaining to the payments.

The Government's attempts to circumvent a potential acquittal by abandoning the core of its case during the first trial, while tailoring a new theory that relies on the same underlying core facts in order to avoid making the same mistakes with a second jury, is precisely the kind of abuse that the Double Jeopardy Clause forbids.

As the court below recognized, "[b]oth the government and the defendant agree that the government abandoned the honest services fraud allegation during trial." App. 20. Nor, in light of the Government's repeated and express disclaimers during trial of any allegations of honest services fraud and bribes and kickbacks, could there be any doubt that there were abandonments here. This Court therefore need not conduct a fact-intensive review of the record to determine if there was an abandonment here.

B. The Fifth Circuit's Failure to Determine the Issue-Preclusive Effects of an Abandonment Will Permit the Reprosecution of Factual Issues Previously Abandoned by the Government After Jeopardy Attached.

Collateral estoppel involves the preclusion of issues, not claims, and does not require that successive prosecutions involve the same causes of action. *Taylor*, 553 U.S. at 892. As this Court held in *Sealfon v. United States*, 332 U.S. 575, 578-79 (1948), when a defendant is charged with "separate and distinct offenses," issue preclusion "operates to conclude those matters in issue which the verdict determined though the offenses be different." *See also Ashe*, 397 U.S. at 443 (issue preclusion "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated"); *United States v. Adams*, 281 U.S. 202, 205 (1930) ("[A]lthough not technically a former acquittal, the judgment was conclusive upon all that it decided.").

The test for issue preclusion established in *Ashe* requires a court to "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444.

The task facing the Fifth Circuit in resolving Hoeffner's double jeopardy claim based on the Government's abandonments at trial – under *Ashe* and *Yeager* as the jeopardy-terminating functional equivalent of an acquittal – was to determine both the *claim-preclusive* effect of the Government's abandonment of its honest services fraud theory and the *issue-preclusive* effect of its abandonments. This required consideration of the Government's abandonment of not only its honest services fraud theory, but also of the underlying fact that the concealed payments constituted bribes or kickbacks made in furtherance of a scheme to defraud. This latter part of the overall abandonment barred retrial on issue-preclusive grounds of a separate money or property fraud theory based on the concealment of the very same payments alleged in the indictment to constitute the bribes or kickbacks. The court below performed the claim preclusion part of the analysis, but did not determine the full scope of the factual issues that were effectively decided in Hoeffner's favor by the abandonments.

The court below correctly recognized that "'when an issue of ultimate fact has once been determined by

a valid and final judgment of acquittal, it cannot again be litigated in a second trial for a separate offense[,]'" App. 19 (quoting *Yeager*, 129 S. Ct. at 2367 (quoting *Ashe*, 397 U.S. at 443)), and that, as the functional equivalent of an acquittal, it "must determine which issues, if any, were decided in [Hoeffner's] favor [by the abandonment] such that the government is now precluded from litigating them in a subsequent trial." App. 21.

But the court, after setting out the correct standard for conducting double jeopardy analysis, inexplicably performed only the first part of the analysis – claim preclusion – by finding that the Government's abandonment of the honest services fraud theory would bar retrial based on that same cause of action. The court did not, however, determine the *scope* of the abandonments of not only the honest services fraud theory but also the bribes and kickbacks allegations – in other words whether any other *underlying factual issues* necessary for a prosecution on the failure-to-disclose money or property fraud theory were decided by either of those abandonments.

Instead of performing issue preclusion analysis based on the entire record, including the Government's numerous representations to the district court and jury, the court below determined if any overlapping issues had been decided in Hoeffner's favor by the abandonments simply by comparing the elements of the abandoned honest services fraud theory and the remaining money or property fraud allegations:

> We look to the record of the proceedings in this case to determine whether any issues have been decided in the defendant's favor. The elements of honest services fraud include (1) a scheme to deprive another of the right to honest services; (2) use of the mails and/or wires to execute the scheme; and (3) materiality of the falsehoods employed in the scheme. We conclude that the only issue decided in the defendant's favor by the government's abandonment of the honest services fraud theory was based on the first element – the defendant did not engage in a scheme to deprive The Hartford of its right to honest services.

App. 21-22 (citation omitted). The court also found that the Government's abandonments had decided that the payments could not be characterized as "bribes or kickbacks." App. 22.

But the court, in order to complete the requisite analysis under *Ashe* and *Yeager*, was also required to determine if any additional underlying *facts* encompassed within those abandoned issues were decided that would be necessary to prove the remaining money or property fraud theory based on those same payments. Instead, in concluding that "[r]etrial on the money and property fraud theory is not precluded because the government need not prove that the defendant deprived The Hartford of its rights to the honest services of its employees or that the payments must be characterized as bribes or kickbacks[,]" App. 22, the Fifth Circuit confused elements analysis,

which is critical to claim preclusion, with the fact analysis necessary to determine the scope of issue preclusion. The latter analysis is not predicated on whether the elements of the claims are identical. The court below would thus permit the Government to retry Hoeffner simply because the elements of honest services fraud are distinct from the elements of fraud by concealment.

If the court below had properly conducted a complete issue preclusion analysis instead of stopping short of determining the full scope of the issue-preclusive effect of what was encompassed within the abandonments, it would have found that the concealment of the alleged payments as furthering a scheme to defraud – a fact necessary to reprosecute the remaining money or property fraud theory – could not be separated from the indictment's exclusive charges of the payments of bribes and kickbacks.[4]

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[4] The court below compounded its error by disclaiming any obligation to determine if the indictment alleged some scheme to defraud *not* premised on bribes and kickbacks, on the basis that "[t]hat argument is not a double jeopardy claim, and it is not properly before us on interlocutory review because it goes to the sufficiency of the money and property fraud theory and not to its existence in the indictment." App. 15-16. But even though the sufficiency of the indictment was not before the court, whether the indictment alleged *any* payments *other than* bribes or kickbacks was a central question to be decided. Notwithstanding that the elements of fraud by concealment do not require the Government to characterize the payments as "bribes or kickbacks," the indictment here limited the charged payments to bribes and kickbacks and the court below should have determined

(Continued on following page)

The payments at issue were alleged in the indictment to be bribes and kickbacks, and it is beyond dispute that the payment of every bribe and kickback is, by definition, concealed and not disclosed to the adversely affected party. "Kickbacks being made criminal means that they must be made – if at all – in secrecy." *United States v. Acme Process Equip. Co.*, 385 U.S. 138, 144 (1966); *see also, e.g.*, 2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* § 47.03 (5th ed. 2010) ("A 'kickback' includes any kind of *undisclosed* payment. . . .") (emphasis added); *cf. Grunewald v. United States*, 353 U.S. 391, 401-02 (1957) ("[A]fter the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret . . . [f]or every conspiracy is by its very nature secret. . . .").

Because concealment was inherent in the only charged payments of bribes and kickbacks in the indictment, the Government, in abandoning its allegations that bribes and kickbacks were paid in furtherance of a scheme to defraud, also abandoned the underlying fact that the payments were concealed in furtherance of such a scheme. The remaining fraud

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if the abandonment of those allegations decided a fact – concealed payments in the form of bribes or kickbacks in furtherance of a scheme to defraud – necessary to prove the remaining money or property fraud theory as it was alleged in the indictment.

count sought to be retried here is thus based on the same underlying fact that was decided in Hoeffner's favor when the Government abandoned its honest services fraud theory and bribes and kickbacks allegations including that those payments were fraudulently concealed. The Fifth Circuit's opinion therefore exposes Hoeffner to retrial based on a theory of fraud that he made undisclosed "payments" to the Employees, even though the concealment of those payments was inherent in the now abandoned bribes and kickbacks which were the *only* payments charged in the indictment.

The Fifth Circuit's decision below significantly erodes the protections afforded by the Double Jeopardy Clause by failing to provide reasoned guidance consistent with *Ashe* and *Yeager* for determining the scope of what is barred by both the claim and issue-preclusive effects of an abandonment, as a jeopardy-terminating event equivalent to an acquittal.

C. There Is Confusion Among the Courts of Appeals Regarding the Extent to Which Abandonment Terminates Jeopardy.

Most courts of appeals to consider the issue have held that the Government's abandonment of a claim or theory of prosecution after trial has commenced is an event that terminates jeopardy. But there is confusion and disagreement among the courts as to what constitutes an abandonment and the scope of its preclusive effects.

In *United States v. Cavanaugh*, 948 F.2d 405 (8th Cir. 1991), the Court of Appeals for the Eighth Circuit held that abandonment terminates jeopardy. The defendants were charged with separate counts of murder and assault, and the jury returned guilty verdicts on the murder charge but did not pass upon the assault charge. The court reversed the murder convictions based on insufficient evidence. *Id.* at 407-08. The defendants argued that retrial on the assault charge was barred by double jeopardy because "it was the government's deliberate strategy that led to the jury not returning a verdict on the assault count. . . ." *Id.* at 412. The court, based on the prosecution's presentation at trial, including its closing argument and proposed jury instructions, found that "the government at trial abandoned any theory that there were two separate and distinct criminal acts[,]" as the government had argued on appeal, and that "the prosecution's deliberate action resulted in the trial terminating without a verdict on the assault charge," and held that "double jeopardy bars retrial under these circumstances." *Id.* at 413-14. The basis of the court's holding was "the manner in which the trial court and the government chose to proceed in the original trial[,] . . . [and because] [t]he jury failed to [reach a verdict] because of the government's strategy in abandoning the assault count in attempting to obtain a second degree murder conviction." *Id.* at 416. But the Eighth Circuit earlier reached the opposite conclusion in *United States v. Cole*, holding that the "claim of double jeopardy by reason of the government's election at the conclusion of the trial to abandon

the conspiracy charge and submit only the charge of aiding and abetting is wholly without merit. Collateral estoppel [] bars relitigation between the same parties of issues actually *determined* at a *previous trial*." 449 F.2d 194, 200-01 (8th Cir. 1971) (quotation omitted).

The First Circuit appears to agree that abandonment of a prosecutorial theory terminates jeopardy. In *Ortiz v. Dubois*, 19 F.3d 708, 716 (1st Cir. 1994), the court found that "if the prosecution decides to submit a case to the jury on one of two equally valid legal theories, and the jury convicts despite insufficient evidence, on appeal the court cannot resurrect the conviction by ruling that there was sufficient evidence to convict on the alternative theory." Otherwise, "an appellate court [would] in effect 'charge[]' a defendant with a new crime, and then conclude[] that the evidence was sufficient to support a conviction for that previously uncharged offense." *Id. Cf. Delap v. Dugger*, 890 F.2d 285, 307 (11th Cir. 1989) ("The refusal to instruct a jury on an offense constitutes an implicit acquittal of that offense for double jeopardy purposes.").

Other courts of appeals have taken a more limited view of the preclusive effect of an abandonment. In *United States v. Wittig*, 575 F.3d 1085 (10th Cir. 2009), the defendants' conspiracy convictions were reversed based on improper jury instructions. *Id.* at 1094. The defendants argued the government was barred under double jeopardy from reprosecuting them on any theory of the case other than the one

pursued during the first trial. *Id.* at 1101. The Court of Appeals for the Tenth Circuit found that the defendants' argument was inconsistent with this Court's decision in *Richardson*, *supra*, which held that "double jeopardy cannot be an available basis for relief when the original jeopardy has not yet terminated." *Wittig*, 575 F.3d at 1102.

The court held there was no bar because jeopardy had not terminated on the conspiracy count, and rejected the argument that the government should be limited to any particular theory of prosecution on retrial:

> Neither can the fact that the government may not have produced sufficient evidence of a particular *theory* at the defendants' earlier mistrial in this case have any more legal significance than the government's failure to produce sufficient evidence of an entire *crime* did in the mistrial at issue in *Richardson*. Until jeopardy terminates, the government is free to pursue any theory of the crime available to it under the indictment so long as that theory is not barred for some other reason (such as collateral estoppel).

Id.

The court did nonetheless note that a narrow interpretation of abandonment as a jeopardy-terminating event "may still have a persuasive application." *Id.* Citing the focus in *Cavanaugh* on the prosecution's deliberate conduct in causing the failure to reach a verdict, and this Court's holding in *Kennedy*,

supra, that jeopardy may terminate where the government intentionally induces the defendant to seek a mistrial, the court opined that:

> [W]hile it is inconsistent with *Richardson* to prohibit the government from changing its theory of the case *just because* a case has mistried, it might be equally consistent with *Kennedy* to prohibit the government from intentionally withholding a theory of liability from the jury in order to get a second chance at proving that theory if things aren't going so well in round one.

Wittig, 575 F.3d at 1103.

Still other courts, though not squarely addressing the issues presented by Hoeffner's petition, have issued holdings potentially in conflict with those courts interpreting abandonments as jeopardy-terminating acquittal-equivalent events for double jeopardy purposes:

> [T]he acquittal of the alleged conspirator does free the accused from further prosecution for the offense charged. The nolle prosequi does not. As in the case of disagreement of a jury, [t]he prisoner has not been convicted or acquitted, and may again be put upon his defence. It is not a bar to a second indictment covering the same matter, although it does terminate the proceedings in which the nolle prosequi occurs.

United States v. Fox, 130 F.2d 56, 58 (3d Cir. 1942) (citation omitted); *see also Craig v. United States*, 81

F.2d 816, 819 (9th Cir. 1936) (citations omitted) (same).

Decisions by the Court of Appeals for the Sixth Circuit further illustrate the confusion regarding the preclusive effects of an abandonment. In *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988), the indictment charged murder under alternative theories of accomplice liability and conspiracy. *Id.* at 1402. The prosecution presented evidence only on the accomplice theory. *Id.* The trial court nonetheless instructed the jury only on the conspiracy theory, and the prosecution did not request an instruction on the accomplice theory. *Id.* The jury convicted, and the conviction was overturned on appeal for insufficient evidence of murder by conspiracy. *Id.* The defendant argued that retrial on the accomplice theory was barred by double jeopardy, and the court agreed, holding that "where the first trial ended without a verdict on the relevant charge for reasons of the prosecution's making, a retrial on that charge would violate the protection the Double Jeopardy Clause affords against harassing reprosecution." *Id.* at 1403.

The court held that the prosecutor's choice to instruct the jury only on the conspiracy theory, even if inadvertent and even though there may have been sufficient evidence for the jury to convict on the uninstructed accomplice theory, had abandoned the accomplice theory. *Id.* at 1407-09. The court noted that a rule "permitting a retrial in this case or in any similar case would be fraught with the possibility of manipulation." *Id.* at 1408. "A prosecutor could indict

on several counts or theories, present evidence on each of them, and then go to the jury only on selected ones, in effect holding the others in reserve for a subsequent or improved effort." *Id.*

The Sixth Circuit subsequently partially retreated from its holding in *Saylor*. In *United States v. Davis*, 873 F.2d 900 (6th Cir. 1989), the defendant had been convicted of mail fraud under an indictment based on an intangible rights theory. *Id.* at 901. The conviction was reversed on the basis that the indictment was legally insufficient following this Court's intervening decision in *McNally v. United States*, 483 U.S. 350 (1987), and the government obtained a superseding indictment based on a new money or property theory. *Davis*, 873 F.2d at 901-03. The defendant moved to dismiss the superseding indictment on double jeopardy grounds. *Id.* at 903.

The court held that retrial was not barred by double jeopardy because the prosecutor was not at "fault" for indicting only under an intangible rights theory that had been valid before *McNally*, and "[t]he potential for prosecutorial abuse that led us to find a termination of jeopardy in *Saylor* simply had no counterpart here." *Id.* at 905. The court further distinguished its case because, unlike in *Saylor*, the theory to be presented during the second trial "was omitted from the indictment, and the theory was expressly disavowed at trial." *Id.* at 906. Thus, "proceedings against Mr. Davis on [the newly indicted] theory cannot fairly be said to have 'terminated' because of the action or inaction of either party, no

such proceedings having been initiated in the first place." *Id.*

The court in *Davis* did, however, acknowledge the dangers inherent in permitting the government to bring multiple prosecutions:

> Perhaps we ought to be [ ] concerned about setting a precedent that would allow a prosecutor to obtain an indictment on one theory . . . and let the case go to a jury on that theory, while holding in reserve a second theory . . . in order to get a subsequent bite at the apple if the jury failed to convict the first time.

Id. at 905. But the court did not believe that concern was at issue in the case before it. *Id.*

There is similar confusion in the state courts. *Compare State v. Quitog*, 938 P.2d 559, 580 (Haw. 1997) (prosecutorial abandonment effects a double jeopardy bar), *with State v. Wright*, 127 P.3d 742, 746-47 (Wash. Ct. App. 2006) (finding *Saylor* unpersuasive).

The Fifth Circuit below, while holding that the Government's abandonments effected a partial double jeopardy bar, added yet another layer of confusion to this already unsettled area of law by claiming to "assume, without deciding," that an abandonment is the functional equivalent of an acquittal for double jeopardy purposes. The court also created additional uncertainty by purporting to limit *Saylor* and *Cavanaugh*. *See* App. 26-27.

To the extent there is any consistency among the courts of appeals, it is that the preclusive effect of an abandonment is predicated on the prosecution's deliberate conduct or culpability in bringing about the events necessitating a second trial. Here, the Government deliberately abandoned its prosecutorial theories and allegations during Hoeffner's first trial. This Court's intervention is necessary to clarify the applicability of the Double Jeopardy Clause, including both claim and issue preclusion, to deliberate and strategic manipulation such as the Government engaged in here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 4, 2011

APPENDIX A

626 F.3d 857

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Warren Todd HOEFFNER, also known as
Todd Hoeffner,
Defendant-Appellant.

No. 09-20781.
Nov. 18, 2010.

John Richard Berry (argued), James Lee Turner, Asst. U.S. Attorneys, Houston, TX, for Plaintiff-Appellee.

Samuel J. Buffone (argued), BuckleySandler, L.L.P., Washington, DC, Dane Christian Ball, David Benjamin Gerger, Gerger & Clarke, Chris Flood, Flood & Flood, Houston, TX, Richard Thaddeus Behrens, Haynes & Boone, L.L.P., Dallas, TX, John T. Flood, Flood & Flood, Corpus Christi, TX, Lynne Liberto, Haynes & Boone, LLP, Houston, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas.

Before KING, HIGGINBOTHAM and GARZA, Circuit Judges.

PER CURIAM:

The defendant appeals from the district court's order denying his motion to dismiss on double jeopardy grounds. The defendant, an attorney, represented

clients bringing silicosis claims against insureds of The Hartford Financial Services Group. He was indicted for wire fraud and mail fraud after he made several payments to employees of The Hartford out of the proceeds from settlements with The Hartford. During the course of a six-week trial, the government abandoned an honest services fraud allegation in the indictment, instead focusing on a money and property fraud allegation. The jury failed to reach a verdict, and the district court granted a mistrial. In this interlocutory appeal, we consider whether the government's abandonment of the honest services fraud theory precludes retrial on the money and property fraud theory. For the following reasons, we hold that retrial is not precluded on the money and property fraud theory.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Warren Todd Hoeffner, an attorney, represented over 900 individuals who brought silicosis and other silica-related claims against manufacturers and sellers of silica-containing products and related protective equipment. Among the insurers of these companies was The Hartford Financial Services Group ("The Hartford"). Rachel Marie Rossow was a claims supervisor working for one of The Hartford's subsidiaries and was responsible for settling claims and recommending appropriate settlement amounts for claims against The Hartford. John Prestage was a claims handler, and his supervisor was Rossow. Both

Rossow and Prestage worked on the silica claims Hoeffner brought against The Hartford's insureds.

In 2002, Hoeffner began contacting the insurers for the silicosis defendants, including The Hartford, and offering to settle his clients' claims. In the following months, Hoeffner successfully settled his clients' claims with most of the defendants and received nearly $56 million in settlement payments, $34 million of which came from The Hartford. Hoeffner received a contingency fee of 40% of the settlement amounts.

During the settlement discussions, Hoeffner met with Rossow and Prestage several times. He funded trips for Rossow and Prestage to Laguna Beach, California, New York City, and Palm Beach, Florida. Also, unbeknownst to The Hartford, Hoeffner paid Rossow approximately $2.6 million and Prestage approximately $760,000 out of the funds that he received from the settlements with The Hartford. Among the payments that Hoeffner made to Rossow and Prestage were several checks drawn from Hoeffner's IOLTA trust account which were mailed to Rossow and Prestage, a wire transfer from Hoeffner's IOLTA trust account to an account owned by Rossow, and a wire transfer to New Country Motors in Hartford, Connecticut for the purchase of two BMW automobiles, one each for Rossow and Prestage.

B. The Indictment

In a superceding indictment dated March 8, 2008,[1] Hoeffner, Rossow, and Prestage were charged with one count of conspiracy to commit mail and wire fraud, one count of conspiracy to commit money laundering, two counts of wire fraud, five counts of mail fraud, and six counts of money laundering.[2]

The conspiracy to commit wire and mail fraud count alleged that the defendants did "knowingly devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises. . . ." The indictment also alleged the "manner and means" of the conspiracy, alleging "[i]t was part of the conspiracy that":

> 17. Defendant Hoeffner would and did make payments to defendants Rossow and Prestage, through bribes and kickbacks, for recommending that subsidiaries of The Hartford pay certain amounts to settle the claims of his clients against The Hartford, its subsidiaries and its Insureds.

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[1] The original indictment was filed on June 25, 2007. The superseding indictment is substantially similar to the original indictment except that it adds an additional count of money laundering. All references to the indictment refer to the superseding indictment.

[2] *See* 18 U.S.C. § 371 (conspiracy); 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1957 (money laundering).

> 18. Defendants Hoeffner, Rossow and Prestage would and did falsely promise, pretend and represent to subsidiaries of The Hartford . . . that the settlement amounts of the claims against The Hartford . . . were appropriate amounts to settle the claims and in the best interests of The Hartford . . . , well knowing that the defendants intended that some of that money (the "Settlement Funds") would instead be funneled by and through Hoeffner to Rossow and Prestage.
>
> 19. Defendants would and did cause subsidiaries of The Hartford to pay more than $34,000,000.00 in Settlement Funds, knowing that more than $3,000,000.00 of those funds would be used to pay bribes and kickbacks to Rossow and Prestage.

The indictment then alleged various wires and mailings as part of the execution of the scheme. In each of the substantive wire and mail fraud counts, the indictment alleged, under the heading "The Scheme and Artifice to Defraud,"

> the defendants . . . did knowingly devise and intend to devise a scheme and artifice to defraud The Hartford and its subsidiaries . . . of their right to the honest services of Prestage and Rossow, and to obtain money and property from The Hartford and its subsidiaries . . . by means of false and fraudulent pretenses, representations and promises, . . . including the concealment of material facts.

The substantive counts each contained a "manner and means" section with allegations identical to those in Paragraphs 17, 18, and 19 of the conspiracy count.

C. The Trial

The district court severed the proceedings against Hoeffner from those against Rossow and Prestage, and Hoeffner was tried before a jury from August 20, 2009 through October 2, 2009. In support of the honest services fraud allegation, the government initially presented evidence that Hoeffner had made payments to Rossow and Prestage from the settlement funds in the form of bribes and kickbacks.[3] In support of the money and property fraud allegation, the government presented evidence that The Hartford would not have engaged in settlement discussions with Hoeffner had it known that its employees were going to receive a portion of the settlements.

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[3] We note that the defendant and the government seemed to have conflicting ideas of what, exactly, Hoeffner may have been bribing Rossow and Prestage to do. The defendant took the position that the indictment alleged that the bribes were given to Rossow and Prestage in exchange for their recommending inflated or overvalued settlement amounts. The government, on the other hand, initially presented evidence that Hoeffner bribed Rossow and Prestage to expedite the settlement approval process because he was concerned about possible impending tort reforms that would make settlement more unlikely.

Hoeffner conceded at trial that he made the payments to Rossow and Prestage, but he offered several theories of defense. He offered evidence that the settlement amounts were fair – i.e., the settlement amounts were not inflated or overvalued, so Hoeffner could not have bribed Rossow and Prestage because he had not received any gain in return. In relation to that theory, Hoeffner presented evidence that Rossow and Prestage were too low in The Hartford hierarchy to exert any influence over the settlement amounts. Hoeffner also testified that he had been extorted into making the payments when Rossow and Prestage threatened to stall the settlement approvals indefinitely.[4]

As the trial progressed, the government retreated from its theory that Hoeffner committed honest services fraud by paying bribes and kickbacks to Rossow and Prestage. Instead, the government took the position that the mere fact of the concealed payments to employees of The Hartford constituted a scheme to obtain money and property from The Hartford. The government also renounced the honest services fraud allegation during closing argument, asking the jury to focus instead on the money and property fraud allegation in the indictment.

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[4] As part of this defense, Hoeffner presented evidence that Rossow was having an affair with David Cain, a high-level executive at The Hartford, and Hoeffner testified that he believed the extortion was done at Cain's direction or at least with his approval.

During the jury charge conference, the government informed the district court that it wished to withdraw the honest services fraud theory from the jury's consideration completely.[5] As a result, the district court, over the defendant's objection, removed all references to honest services fraud, as well as bribes and kickbacks, from the jury instructions for the substantive fraud counts,[6] though the instruction

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[5] The government attempted to redact all references to bribes and kickbacks and honest services fraud from the indictment. The defendant objected to the redactions, and the district court sent the unaltered indictment to the jury.

[6] The judge instructed the jury as follows with regard to the substantive wire and mail fraud counts:

> For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:
>
> First: That the defendant knowingly created a scheme and artifice to obtain money and property from The Hartford and its subsidiaries, by means of false and fraudulent pretenses, representations and promises, including the concealment of material facts by falsely promising, pretending and representing that the settlement amounts of the claims against The Hartford, its subsidiaries and its insureds were appropriate amounts to settle the claims in the best interest of The Hartford, its subsidiaries and its insureds, well knowing that the defendant and Rachel Rossow and John Prestage intended that some of the settlement money would instead be funneled through the defendant to Rossow and Prestage.
>
> . . .
>
> A "scheme to defraud" includes any scheme to deprive another of money or property by false and fraudulent pretenses, representations or promises.

for the conspiracy count still contained a reference to bribes and kickbacks.[7]

After three days of deliberation, the jury informed the district court that it was unable to reach a unanimous verdict. The district court then granted the defendant's request for a mistrial. Following the mistrial, the government immediately sought to retry the defendant on the same indictment. On October 19, 2009, the defendant filed a motion to dismiss the indictment on double jeopardy grounds. The defendant argued below, as he does here, that the government abandoned the entire indictment when it abandoned the honest services fraud theory at trial. This abandonment, according to the defendant, had the effect of a dismissal and precludes retrial on the money and property fraud theory.

On November 18, 2009, before the district court ruled on the defendant's motion to dismiss, the government obtained a second superseding indictment, which contained no reference to the honest services fraud theory or to bribes and kickbacks. On November 19, 2009, the district court denied, without

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[7] The instruction for the conspiracy count was substantially the same as the instruction for the substantive fraud counts, except that it required the jury to find that the defendant engaged in a "scheme and artifice to defraud The Hartford and its subsidiaries by paying bribes and kickbacks to Rachel Rossow and John Prestage . . . for their recommending that The Hartford pay settlement amounts *or* to obtain money and property from The Hartford . . ." (emphasis added).

explanation, the defendant's motion to dismiss. The defendant filed his notice of appeal the next day.

II. DISCUSSION

A. Standard of Review

We review de novo the district court's order denying the defendant's motion to dismiss the indictment on double jeopardy grounds, but we accept as true the district court's underlying factual findings unless clearly erroneous. *United States v. Mauskar*, 557 F.3d 219, 227 (5th Cir. 2009) (quoting *United States v. Gonzalez*, 76 F.3d 1339, 1342 (5th Cir. 1996)). In this interlocutory appeal, we are concerned only with the defendant's claim of double jeopardy, and we do not address the sufficiency of any of the allegations in the indictment. *See Abney v. United States*, 431 U.S. 651, 663, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

B. Theories of Liability in the Indictment

We first decide whether the indictment alleged one theory of mail and wire fraud or two. The gravamen of the defendant's appeal is that the indictment contains only an honest services fraud theory of liability, which he calls the "bribes for lies" theory. According to the defendant, when the government abandoned the honest services fraud theory at trial, the government in effect abandoned the indictment completely, constructively dismissing the charges against him and terminating jeopardy with regard to all of the mail and wire fraud counts. The

government, on the other hand, contends that the indictment also alleged a scheme to obtain money and property, independent of the honest services fraud theory, and that it did not abandon the entire indictment when it abandoned the honest services fraud theory.

"The [Supreme] Court has long recognized that an indictment may charge . . . the commission of any one offense in several ways." *United States v. Miller*, 471 U.S. 130, 136, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). Indeed, "[i]t is well-established in this Circuit that a disjunctive statute may be pleaded conjunctively and proved disjunctively." *United States v. Haymes*, 610 F.2d 309, 310 (5th Cir. 1980).

The mail and wire fraud statutes are drafted in the disjunctive. They provide that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations or promises," uses the mail or wires is guilty of mail or wire fraud. 18 U.S.C. §§ 1341, 1343 (emphasis added). Section 1346 further defines the scope of punishable offenses, providing that a "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Though the statutes criminalize the use of the mails and wires for "a variety of schemes," *United States v. McMillan*, 600 F.3d 434, 447 (5th Cir. 2010), they provide at least two means of committing mail or wire fraud: (1) a scheme or artifice to deprive another of his intangible right to

honest services; and (2) a scheme or artifice to obtain money or property, *see United States v. Ratcliff*, 488 F.3d 639, 644 (5th Cir. 2007) (noting at least three different schemes punishable by the mail and wire fraud statutes).

The indictment at issue in this case tracks the language of the statute exactly except that the honest services fraud and the money and property fraud are charged in the conjunctive. In Paragraph 15 of the conspiracy count, the indictment alleges that the defendant conspired with Rossow and Prestage "[t]o knowingly devise and intend to devise a scheme and artifice to defraud *and* to obtain money by means of false and fraudulent pretenses" (emphasis added). Similarly, in each of the substantive mail and wire fraud counts, the indictment alleges that the defendant, along with Rossow and Prestage, "did knowingly devise and intend to devise a scheme and artifice to defraud The Hartford and its subsidiaries . . . of their right to the honest services of Prestage and Rossow, *and* to obtain money and property from The Hartford and its subsidiaries . . . by means of false and fraudulent pretenses . . . , including the concealment of material facts" (emphasis added). We do not agree with the defendant that the indictment alleges only one theory of liability. The indictment tracks the language of the mail and wire fraud statutes, which provide for at least two means of committing mail and wire fraud, and thus alleges at least two means of violating the statutes. *See United States v. Gordon*, 780 F.2d 1165, 1171 (5th Cir. 1986) ("[A]n indictment

which tracks the statutory language is sufficient to charge mail fraud [or] wire fraud.") (internal citations omitted).

Our conclusion is bolstered by our recent decision in *United States v. Brown* (*Brown II*), 571 F.3d 492 (5th Cir. 2009). In that case, several former Merrill Lynch executives were indicted and convicted, along with two Enron executives, for wire fraud in connection with a scheme to artificially enhance Enron's 1999 earnings. *Id.* at 494. We vacated their original convictions, holding that the indictment did not allege a viable honest services fraud theory.[8] *See United States v. Brown* (*Brown I*), 459 F.3d 509, 517 (5th Cir. 2006). When the government sought to retry the defendants for wire fraud, they appealed, arguing that a retrial would violate the Double Jeopardy Clause. *Brown II*, 571 F.3d at 496. We held that retrial would not violate the Double Jeopardy Clause, because, even though the government was precluded from retrying the defendants on the honest services theory, the money and property theory had survived. *Id.* at 498.

The language in the *Brown* indictment mirrors the language of the indictment in this case. The *Brown* indictment's conspiracy count alleged that

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[8] "The panel reasoned that while honest services fraud generally involves bribery, kickbacks, or self-dealing, the defendants' conduct was disassociated from such actions." *Brown II*, 571 F.3d at 496.

"[the defendants] conspired to . . . knowingly and intentionally devise a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees, *and* to obtain money and property by means of materially false and fraudulent pretenses. . . ." *Id.* at 495 n.6 (emphasis added). The substantive wire fraud counts similarly alleged that the defendants had "devised a scheme and artifice to defraud Enron and its shareholders, including to deprive them of the intangible right of honest services of its employees, *and* to obtain money and property by means of materially false and fraudulent pretenses. . . ." *Id.* (emphasis added). Based on this language, the defendants in *Brown* argued, as Hoeffner does here, that the "indictment charged as the object of the wire fraud only the deprivation of the intangible right of honest services." *Id.* at 496-97. We rejected that argument, holding that the defendants could be retried on the money and property fraud theory, which survived after the government redacted the indictment to remove the references to the honest services fraud theory. *Id.* at 498.

Despite the clear language of the indictment, Hoeffner argues that the indictment, taken in its entirety, alleges only honest services fraud. In support of his assertion, the defendant points to Paragraphs 17 through 19 in the manner and means section of the conspiracy count, which are repeated verbatim in the substantive fraud counts. Paragraph 17 alleges that the defendant made payments to

Rossow and Hoeffner "through bribes and kickbacks" for recommending settlement amounts to The Hartford. Paragraph 18 alleges that the defendant, Rossow, and Prestage falsely represented that the settlement amounts were in The Hartford's best interests, "well knowing that the defendants intended that some of that money would instead be funneled by and through Hoeffner to Rossow and Prestage." Finally, Paragraph 19 states that more than $3 million of the funds that the defendant received were "used to pay bribes and kickbacks to Rossow and Prestage." These paragraphs taken together, the defendant argues, signal that the indictment alleges a single scheme involving bribes and kickbacks, and therefore a single theory of liability based on honest services fraud.

We are unpersuaded by the defendant's argument. The defendant fixates on the "bribes and kickbacks" language in the manner and means sections of the indictment, but disregards the allegation, contained in every count, that he engaged in a scheme to obtain money and property from The Hartford through false and fraudulent pretenses when he, Rossow, and Prestage concealed the payments from The Hartford. The core of the defendant's argument is that the indictment did not allege a money and property fraud theory because the only scheme to defraud was premised on bribes and kickbacks. That argument is not a double jeopardy claim, and it is not properly before us on interlocutory review because it goes to the sufficiency of the money and property

fraud theory and not to its existence in the indictment.[9] *See Brown II,* 571 F.3d at 498; *Abney,* 431 U.S. at 663, 97 S.Ct. 2034.

Nor are we persuaded by the defendant's argument that the indictment, to the extent it alleges two theories of liability, alleges two theories of honest services fraud – one based on bribery and the other for undisclosed self-dealing. At oral argument, the defendant's counsel urged us to consider the history of honest services fraud in this circuit in order to convince us that the reference to "concealment" in the indictment refers to undisclosed self-dealing, a now-defunct species of honest services fraud, and not concealment for the purpose of obtaining money and property.

To understand the defendant's argument, we must consider the state of the law before *Skilling v. United States,* ___ U.S. ___, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). In *Skilling,* an Enron executive was indicted for honest services fraud for his undisclosed self-dealing related to Enron's spiral into bankruptcy. *Id.* at 2908. The government argued that

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[9] The defendant also asserts that the indictment does not state an offense for money and property fraud absent the honest services fraud allegation and the bribes and kickbacks language. He contends that a scheme involving mere "payments" that were not disclosed, as opposed to bribes and kickbacks that were not disclosed, would render the indictment unconstitutionally vague. This argument also goes to the sufficiency of the complaint, which we are not permitted to review at this point.

the honest services fraud statute permitted prosecution for two species of fraud related to intangible rights: bribery and undisclosed self-dealing. *Id.* at 2931-32. The Court rejected that argument, holding that honest services fraud is actionable only for schemes involving bribes and kickbacks. *Id.* at 2933.

The defendant argues that the references to concealment in the indictment must have been based on the government's pre-*Skilling* attempts to indict defendants for honest services fraud based on undisclosed self-dealing. As evidence, the defendant notes that § 1346, which defines scheme to defraud as including deprivation of the right to honest services, is cited only in the substantive fraud counts, which is also where the word "concealment" appears in the indictment. The defendant believes that this juxtaposition is not coincidental, and that the "concealment" alleged in the indictment must be that Rossow and Prestage concealed their self-dealing from their employer.

This argument is not persuasive. Counts 3 through 9 of the indictment, the substantive fraud counts, allege that the defendant engaged in a scheme and artifice "to obtain money and property from The Hartford . . . by means of false and fraudulent pretenses . . . , including the concealment of material facts." The indictment uses the term "concealment" to explain that one of the "false and fraudulent pretenses" employed by the defendant to obtain money and property was the concealment of material facts. The reference to § 1346 does not appear until

the last sentence of each count, whereby the indictment alleges that the acts described in the count were "[i]n violation of Title 18, United States Code, Sections [1341 and 1343], 1346, and 2." As the government concedes, the indictment does contain an honest services fraud allegation in addition to the money and property fraud allegation. We do not connect the word "concealment" with honest services fraud based on undisclosed self dealing because it is clear from the indictment that concealment appears in connection with the money and property fraud allegation. To the extent that the indictment may have alleged honest services fraud with regard to undisclosed self-dealing, we find that the allegation was separate and apart from the money and property fraud allegation.[10]

C. Government Abandonment of a Theory

Having decided that the indictment does, in fact, allege two theories of liability, we next must determine the consequence of the government's abandonment of one of those theories. The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life

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[10] We note that the indictment in *Skilling* alleged, along with the invalid honest services fraud theory, a money and property fraud theory. *See Skilling*, 130 S.Ct. at 2934 ("[T]he indictment alleged three objects of the conspiracy-honest-services wire fraud, money-or-property wire fraud, and securities fraud.").

or limb." U.S. Const. amend V. "As traditionally understood, the Double Jeopardy Clause precludes multiple prosecutions and multiple punishments for the same offense." *Brown II,* 571 F.3d at 497 (internal quotation omitted); *see also Brown v. Ohio,* 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). The Double Jeopardy Clause is not implicated, however, "when[ ] the State seeks a second trial after its first attempt to obtain a conviction results in a mistrial because the jury has failed to reach a verdict. . . . [T]he second trial does not put the defendant in jeopardy 'twice.'" *Yeager v. United States,* ___ U.S. ___, 129 S.Ct. 2360, 2366, 174 L.Ed.2d 78 (2009). "Instead, a jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled." *Id.*

The Double Jeopardy Clause operates to "preclude[ ] the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Id.* This is because "'[w]hen an issue of ultimate fact has once been determined by a valid and final judgment' of acquittal, it 'cannot be litigated' in a second trial for a separate offense." *Id.* at 2367 (quoting *Ashe v. Swenson,* 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)). We have held that when a prosecutor opts to voluntarily discontinue a trial after jeopardy has attached, the dismissal functions as an acquittal on the charge, and issues implicated by the dismissed counts are deemed to be

resolved in the defendant's favor. *Humphries v. Wainwright,* 584 F.2d 702, 705-06 (5th Cir. 1978).

To determine which issues, if any, were necessarily decided in the defendant's favor during a previous trial, we must "'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter.'" *Yeager,* 129 S.Ct. at 2367 (quoting *Ashe,* 397 U.S. at 444, 90 S.Ct. 1189). "[T]he inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* (quoting *Ashe,* 397 U.S. at 444, 90 S.Ct. 1189). "[A] defendant invoking *Ashe* has 'the burden . . . to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.'" *United States v. Whitfield,* 590 F.3d 325, 371 (5th Cir. 2009) (quoting *Dowling v. United States,* 493 U.S. 342, 350, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)).

Here, we do not have the benefit of a jury verdict on the honest services fraud theory. Both the government and the defendant agree that the government abandoned the honest services fraud allegation during trial. The parties also agree that this abandonment of the honest services fraud theory had the effect of acquitting the defendant with regard to that theory. *See Humphries,* 584 F.2d at 705-06. We therefore assume, without deciding, that the abandonment functioned as an acquittal of the defendant with regard to the honest services fraud theory only.

Assuming that the government's abandonment of the honest services fraud theory functioned as an acquittal *on that theory only*, and assuming that, as a result, the acquittal necessarily decided certain issues in the defendant's favor, we must determine which issues, if any, were decided in the defendant's favor such that the government is now precluded from litigating them in a subsequent trial. The relevant inquiry is whether the issue "was a critical issue of ultimate fact" in the previous proceeding. *Yeager*, 129 S.Ct. at 2368; *see also Humphries*, 584 F.2d at 705-06. In *Humphries*, the prosecutor voluntarily dismissed a charge, after jeopardy had attached, that the defendant had been driving while intoxicated. 584 F.2d at 704. We held that the dismissal, which functioned as an acquittal, had decided in the defendant's favor one of two possible critical facts: either that he was not driving or that he was not intoxicated. *Id.* at 705-06. We accepted the district court's finding, which was based on an examination of the record and circumstances of the prior proceeding, that the dismissal had decided that the defendant was not intoxicated. *Id.* Thus, any further prosecution for vehicular manslaughter by intoxication was barred because the element of intoxication had already been decided by the previous dismissal. *Id.* at 706.

We look to the record of the proceedings in this case to determine whether any issues have been decided in the defendant's favor. The elements of honest services fraud include (1) a scheme to deprive another of the right to honest services; (2) use of

the mails and/or wires to execute the scheme; and (3) materiality of the falsehoods employed in the scheme. *Ratcliff*, 488 F.3d at 643-44. We conclude that the only issue decided in the defendant's favor by the government's abandonment of the honest services fraud theory was based on the first element – the defendant did not engage in a scheme to deprive The Hartford of its right to honest services. Based on the government's attempts to redact the words "bribes and kickbacks" from the indictment, its failure to present evidence that the payments were bribes, and its failure to argue that the payments were bribes, we find that the government's abandonment decided, at most, that the payments Hoeffner made to Rossow and Prestage cannot be characterized as bribes or kickbacks. Because the defendant did not contest the fact of the payments, we conclude that this fact was not decided in the defendant's favor.

Retrial on the money and property fraud theory is not precluded because the government need not prove that the defendant deprived The Hartford of its rights to the honest services of its employees or that the payments must be characterized as bribes or kickbacks. Indeed, in a mail or wire fraud case premised on a scheme to obtain money or property, "[t]he issue is whether the victims' property rights were affected by the misrepresentations." *McMillan*, 600 F.3d at 449.

The defendant argues that, even if the indictment alleged two theories of liability, both theories were predicated on the same scheme to defraud The

Hartford – the payment of bribes and kickbacks to Rossow and Prestage – which the government abandoned. In support of this argument, he again points us to the manner and means sections of the indictment. In each count, after the indictment alleges both a scheme to deprive The Hartford of the honest services of its employees and a scheme to obtain money and property from The Hartford, the indictment goes on to state "It was part of the scheme and artifice to defraud that [Hoeffner paid bribes and kickbacks to Rossow and Prestage]." According to the defendant, the government abandoned the entire manner and means section when it abandoned the honest services fraud theory and admitted that the payments were not bribes or kickbacks, leaving no manner and means of committing money and property fraud.

Again, we believe the defendant's real complaint is that the indictment failed to allege a separate scheme to obtain money and property.[11] As we noted

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[11] Early in the trial the defendant brought an emergency motion to disclose the grand jury materials, arguing that the government had constructively amended the indictment. He was concerned that the government was presenting only evidence that Hoeffner, Rossow, and Prestage had concealed the payments and not presenting any evidence that the payments were bribes or kickbacks. The district court denied the motion, stating "I believe that the defense was appraised from the very first status conference as to what the government's theory of this case was. The defense disagreed with it, but they knew about it."

Even assuming the government's proof at trial varied from the indictment such that the indictment was constructively

(Continued on following page)

above, the indictment does in fact allege that the defendant engaged in a scheme to obtain money and property from The Hartford by means of false and fraudulent pretenses. Furthermore, it is not clear that the entire manner and means section refers to the honest services fraud theory and not the money and property fraud theory. For instance, Paragraph 18 contains no reference to bribes or kickbacks. But even if the entire manner and means section of the indictment related only to the honest services fraud theory, the defendant's complaint about the indictment's failure to allege a manner and means of committing money and property fraud goes to the sufficiency of the indictment, a matter which we cannot review on this interlocutory appeal. *See Brown II*, 571 F.3d at 498; *Abney*, 431 U.S. at 663, 97 S.Ct. 2034.

In arguing that the government is precluded from retrying him on a money and property fraud theory, the defendant relies heavily on *United States v. Gray*, 705 F.Supp. 1224 (E.D. Ky. 1988), and *United States v. Slay*, 717 F.Supp. 689 (E.D. Mo. 1989). In *Gray*, the government indicted the defendants for mail fraud, alleging four distinct theories, including

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amended, retrial would not be precluded on double jeopardy grounds. *See United States v. Mize*, 820 F.2d 118, 119-20 (5th Cir. 1987) (reversal based on a constructive amendment of the indictment does not bar conviction based on retrial of an indictment containing proper allegations).

two intangible rights theories (similar to the honest services theory allowed by § 1346). 705 F.Supp. at 1226. After the defendants were convicted of mail fraud, the Supreme Court reversed their convictions, holding that the mail fraud statute in force did not support the intangible rights theory of prosecution. *See McNally v. United States*, 483 U.S. 350, 359-60, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).[12] On remand, the government sought to retry the defendants on the remaining theories of mail fraud, which included a money and property fraud theory. *Gray*, 705 F.Supp. at 1231. The court held that retrial was precluded because, although it was alleged in the indictment and technically instructed to the jury, the government had abandoned the money and property fraud theory at trial by failing to present any evidence or argument to support that theory. *Id.* at 1231-32.

Similarly, in *Slay*, the indictment alleged multiple theories of mail fraud, including honest services fraud and money and property fraud theories. 717 F.Supp. at 690. The jury convicted the defendant of mail fraud, but the Supreme Court released its decision in *McNally* before the defendant was sentenced. *Id.* at 691. The government sought to retry the defendant on the money and property fraud theory, but the district court dismissed the indictment on double jeopardy grounds. *Id.* at 696. The court found that,

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[12] In response to *McNally*, Congress quickly enacted 18 U.S.C. § 1346, which specifically allows prosecution under the mail fraud statute for a scheme to deprive honest services.

while the indictment alleged a money and property fraud theory and the jury was technically instructed on the theory, the government had abandoned the money and property theory during trial by failing to present any evidence or argument related to that theory. *Id.* at 695-96.

The defendant's reliance on these cases is misplaced. We agree with the defendant that the holdings of these cases demonstrate that once the government abandons a theory by failing to present any evidence related to the theory, the government cannot seek to retry a defendant on the abandoned theory. But this case is factually distinct from *Slay* and *Gray*. Whereas in those cases the government failed to present any evidence of money and property fraud and focused its attention on honest services fraud, in this case the government focused its attention on the money and property fraud theory, paying little attention to the honest services fraud theory. Therefore, retrial is not precluded on the government's unabandoned money and property fraud theory.

The defendant also relies heavily on *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988) and *United States v. Cavanaugh*, 948 F.2d 405 (8th Cir. 1991). We find the defendant's reliance on these cases equally unconvincing. In both cases, the defendant was indicted on two theories of liability. *See Saylor*, 845 F.2d at 1402 (murder by conspiracy and murder as an accomplice); *Cavanaugh*, 948 F.2d at 412 (murder and assault resulting in serious bodily injury). In each

case, the jury convicted the defendant on one theory but failed to return any verdict with regard to the other theory. *Saylor*, 845 F.2d at 1404; *Cavanaugh*, 948 F.2d at 412, 414. The defendants' convictions were reversed for insufficient evidence with regard to the convicted theory, and the government sought to retry the defendants on the other theory. *Saylor*, 845 F.2d at 1404; *Cavanaugh*, 948 F.2d at 411-12. Both the Sixth Circuit and the Eighth Circuit held that retrial was precluded because jeopardy had terminated with regard to the second theory when the jury failed to return a verdict. *Saylor*, 845 F.2d at 1404, 1408; *Cavanaugh*, 948 F.2d at 414, 417. In this case, however, jeopardy has not terminated with regard to the money and property fraud theory because the jury's failure to reach a verdict was the result of a mistrial, not a product of the government's failure to obtain a verdict on the theory.

We hold that the Double Jeopardy Clause bars retrial on the honest services fraud theory in the indictment. Retrial is not precluded, however, on the money and property fraud theory. Therefore, it was not error for the district court to deny the defendant's motion to dismiss the indictment.

CONCLUSION

For the foregoing reasons, the order of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
V.	§	
WARREN TODD HOEFFNER, RACHEL ROSSOW AND JOHN PRESTAGE,	§	C.R. ACTION NO. H-07-263
Defendants.	§	

ORDER

(Filed Nov. 19, 2009)

Pending before the Court is Defendant Warren Todd Hoeffner's Motion to Dismiss Indictment (Document No. 108), Motion to Dismiss (Document No. 113), Renewed Motion for Judgment of Acquittal (Document No. 419), Motion to Dismiss on Double Jeopardy Grounds (Document No. 423) and Supplemental Rule 29 Motion for Judgment of Acquittal (Document No. 427). Having considered the motions, submissions, and applicable law, the Court determines that the foregoing motions should be denied. Accordingly, the Court hereby

ORDERS that all of the foregoing motions are DENIED.

Signed the 20 day of November, 2009.

/s/ David Hittner
DAVID HITTNER
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-20781

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WARREN TODD HOEFFNER,
also known as Todd Hoeffner

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Jan. 4, 2011)

(Opinion 11/18/10, 5 Cir., ___, ___, F.3d ___)

Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the

court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

* Judges Smith, Dennis, Elrod, and Haynes did not participate in the consideration of the rehearing en banc.

REHG6A

APPENDIX D

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

Section 1341 of Title 18 of the United States Code provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the

> purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341.

Section 1343 of Title 18 of the United States Code provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for

> obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343.

Section 1346 of Title 18 of the United States Code provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.